Supreme Court, U.S.
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No. 00-342

In The

Supreme Court of the United States

TAIWAN, et al.,

Petitioners,

vs.

TEI YAN SUN and YEH HWA SUN, individually and as Personal Representatives of PETER SUN, Deceased, and PHILIPE SUN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. Review At This Time Is Proper, As The Ruling On The Motion Below Is Not "Interlocutory": Like This Case, Both Supreme Court Decisions Considering The FSIA Came Up On Motions To Dismiss 2

II. The Opposition Does Not Refute That The *Nelson* Test Is Applied Haphazardly 3

III. Contrary To Respondents' Contentions, The Ninth Circuit's Ruling Below Reached The Opposite Conclusion From The Fifth Circuit's Decision In *Kelly v. Syria Shell Petroleum Dev. B.V.*, 1213 F.3d 841 (5th Cir. 2000) Petition For Certiorari Filed (August 29, 2000) (No. 00-339) 4

IV. Respondents Do Not Address The Third Question Presented In The Petition, I.e., Whether The Overseas Training Constitutes "Commercial Activity" 6

V. Even If This Court Decides Not To Undertake The Task Of Clarifying The "Based Upon" Language Of The FSIA, It Is Respectfully Urged That It Should Summarily Reverse The Ninth Circuit's Decision Because It Directly Conflicts With *Nelson* 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Burger King v. Rudzewicz
471 U.S. 462 (1985) 3

City of Lafayette, LA v. Louisiana Power & Light Co.
435 U.S. 389 (1978) 2

International Shoe Co. v. Washington
326 U.S. 310 (1945) 3

Kelly v. Syria Shell Petroleum Dev. B.V.
213 F.3d 841 (5th Cir. 2000)
petition for cert. filed (August 29, 2000) (No. 00-339) 4, 5, 6

Republic of Argentina v. Weltover, Inc.
504 U.S. 607 (1992) 3

Saudi Arabia v. Nelson
507 U.S. 349 (1993) ..... *passim*

Singleton v. Wulff
428 U.S. 106 (1976) 2

Sugimoto v. Exportadora de Sal, S.A. De C.V.
19 F.3d 1309 (9th Cir. 1994), *cert. denied*, 513 U.S. 1018 (1994) 3

Sun v. Taiwan
201 F.3d 1105 (9th Cir. 2000) 3, 4, 5, 7, 8

STATUTES

28 U.S.C. § 1291 2

28 U.S.C. § 1605(a)(2) 5, 6

INTRODUCTION

Taiwan[1] has properly sought this Court's review, which should be granted because the petition raises crucial questions of international statecraft, stemming from a widespread lack of uniformity regarding the test for jurisdiction under the Foreign Sovereign Immunities Act ("FSIA").

- Is the FSIA nothing more than another long-arm statute requiring only minimum contacts?[2]
- Or are the jurisdictional contacts required truly "substantial?"
- If so, when is an action **"based upon"** commercial activity carried on in the United States?

Respondents do not dispute that the law in this area is in disarray and do not address the conflict among the circuits. [Brief in Opposition, p. 11.] Instead, they simply suggest that this particular case may not be a good vehicle for review. [*Id.* at 11, 14.] To the contrary, the Ninth Circuit's decision invites review: Not only does it interpret the FSIA in such a way that it becomes a dead letter, but to do so, it must defy the controlling authority laid

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[1] References in this brief to "Taiwan" collectively include all Petitioners.

[2] If the Ninth Circuit's opinion in this case is allowed to stand, will it not be the dropping of the other "international shoe?" Are we going to treat sovereign states like any ordinary business? These questions obviously raise issues of international comity which need clear insight and greater guidance that could only come from this Court.

down by this Court in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). The circuit courts need clearly-defined standards for asserting jurisdiction over foreign sovereigns. Taiwan's petition squarely raises these issues and, because of their obvious international implications, this Court should grant certiorari.

ARGUMENT

I. Review At This Time Is Proper, As The Ruling On The Motion Below Is Not "Interlocutory": Like This Case, Both Supreme Court Decisions Considering The FSIA Came Up On Motions To Dismiss.

Taiwan's petition is proper and is not, contrary to Respondents' argument, interlocutory. The District Court granted Taiwan's motion to dismiss the complaint, resulting in a judgment in Taiwan's favor. [A copy of the Judgment is attached hereto as Appendix E.] Respondents' appeal, therefore, was from a final judgment, not an interlocutory order. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (granted motion to dismiss is "final decision" under 28 U.S.C. § 1291). The Ninth Circuit's partial reversal does not render the appeal interlocutory. *See, e.g., City of Lafayette, LA v. Louisiana Power & Light Co.*, 435 U.S. 389, 393 (1978).

As in most cases challenging jurisdiction, this case has reached the Supreme Court – as it almost necessarily must – on a motion to dismiss. Consistent with this procedural posture, the leading Supreme Court decisions to consider the proper scope of jurisdiction began as

motions to dismiss. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). Similarly, the only two FSIA cases to reach this Court began as motions to dismiss. *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (circuit court reversed and remanded district court order granting motion to dismiss – certiorari granted); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). Obviously, orders granting motions to dismiss are not interlocutory and there is no "piecemeal" litigation. This particular case presents itself as the next FSIA case this Court should consider and squarely presents issues of great jurisprudential significance.

II. The Opposition Does Not Refute That The *Nelson* Test Is Applied Haphazardly.

Significantly, Respondents do not dispute that the circuit courts have applied the *Nelson* test inconsistently, nor do they dispute that the test in *Nelson* is in need of clarification. [Brief in Opposition, p. 11.] Instead, because they agree with the Ninth Circuit's interpretation of *Nelson*, Respondents simply argue that this case is not a good vehicle for review. [*Id.* at 11, 14.]

If the Ninth Circuit's interpretation of *Nelson* is correct, then it is only one more reason why this Court should grant review. In this case, the Ninth Circuit strained to find jurisdiction against Taiwan. The Ninth Circuit would predicate jurisdiction against Taiwan "if *an element* of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States." *Sun v. Taiwan*, 201 F.3d 1105, 1109 (citing *Sugimoto v. Exportadora de Sal, S.A. De C.V.*, 19 F.3d 1309 (9th Cir.

1994), *cert. denied*, 513 U.S. 1018 (1994) (emphasis in original). The court below, however, did not analyze the "elements" of the claim, but alluded to an "affirmative duty" on the part of Taiwan. *Sun*, 201 F.3d at 1110.

Thus, **duty** was the only "element" of Respondents' claim that could form the basis for jurisdiction over Taiwan. Heretofore, no court has ever had to determine the locus of the element of duty. There is no legal precedent or rule of law that requires such analysis in any other context. Besides, duty always abides with the plaintiff. It follows plaintiff wherever the plaintiff may go. The duty is owed *to* the plaintiff. Using the location of the duty, therefore, is simply the same as saying that jurisdiction will be wherever the plaintiff is. If this reasoning were employed in *Nelson* there would be jurisdiction over Saudi Arabia because Saudi Arabia owed a duty to the plaintiff residing in the United States.

As demonstrated by the survey of conflicting authority contained in the petition at pages 10-11 (which was not discussed or disputed by Respondents), the vagueness of the FSIA and the malleability of the *Nelson* test are yielding unacceptably inconsistent results. In an area as important as jurisdiction over foreign sovereigns, greater clarity is urgently needed.

III. Contrary To Respondents' Contentions, The Ninth Circuit's Ruling Below Reached The Opposite Conclusion From The Fifth Circuit's Decision In *Kelly v. Syria Shell Petroleum Dev. B.V.*, 1213 F.3d 841 (5th Cir. 2000) Petition For Certiorari Filed (August 29, 2000) (No. 00-339).

Respondents' attempts to reconcile this case and the Fifth Circuit's ruling in *Kelly v. Syria Shell Petroleum Dev. B.V.*,

213 F.3d 841 (5th Cir. 2000) *petition for certiorari filed* (August 29, 2000) (No. 00-339) are unavailing. Only two days before Taiwan filed its petition, the plaintiffs in *Kelly* filed a petition for writ of certiorari which raises *verbatim* the primary issue raised here, to wit:

> Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2), what legal analysis should be followed by state and federal courts to determine whether a claim is "based upon" commercial activity in light of this Court's ruling in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993)?

This issue – essentially, what does "based upon" mean – remains both elusive and contentious even after *Nelson*. In this case, the Ninth Circuit relied on the "elements of the claim test" concluding that a duty can form the basis for jurisdiction against a foreign sovereign. By contrast, the Fifth Circuit in *Kelly*, relying on the same test, rejected plaintiffs' claim that a duty arising in the United States could give rise to the assertion of jurisdiction over the foreign sovereign involved in that case. Respondents herein argue that the Fifth Circuit's reasoning "implies" that jurisdiction might have been found. [Brief in Opposition, pp. 15-16.] The fact remains, however, that jurisdiction was *not* found under the facts of that case.

Even if one were to assume that the Fifth Circuit might have found jurisdiction, the disparate results in the Fifth and Ninth Circuits constitute further evidence that the *Nelson* test does not engender predictability and uniformity in this important area of the law. Had the *Sun* case been brought in the Fifth Circuit, it seems clear that the Fifth Circuit would have rejected Plaintiffs' theory that a duty can form the basis for jurisdiction, under the

facts of this case. Similarly, it seems clear that the Plaintiffs in *Kelly* would have obtained a different ruling had they brought suit in the Ninth Circuit. Greater predictability is needed, particularly on issues of such international importance as jurisdiction over foreign sovereigns.

IV. Respondents Do Not Address The Third Question Presented In The Petition, I.e., Whether The Overseas Training Constitutes "Commercial Activity."

The opposition does not address the first step in the jurisdictional analysis under the FSIA, namely, whether the foreign sovereign engaged in "commercial activity." Respondents incorrectly state that Taiwan "does not challenge" the Ninth Circuit's holding that the Overseas Training is commercial activity. [Brief in Opposition, p. 9.] Taiwan does challenge that holding. Indeed, it is the third Question Presented and Taiwan devotes an entire subsection to the subject. [Petition, pp. 18-19.] In that subsection, Taiwan argues: "The Ninth Circuit's decision may also be summarily reversed because, in contravention of *Nelson*, it ruled that the Overseas Training was 'commercial activity carried on in the United States.' " [*Id.* at 18, citing 28 U.S.C. § 1605(a)(2).]

Accordingly, this Court could rule, much as it did in *Nelson*, that the Overseas Training is "peculiarly sovereign" and not commercial activity. *Nelson*, 507 U.S. at 361. In that manner, it could limit the jurisdictional reach of United States Courts over foreign sovereigns, without necessarily reaching the issue of whether a particular claim is "based upon" commercial activity.

V. Even If This Court Decides Not To Undertake The Task Of Clarifying The "Based Upon" Language Of The FSIA, It Is Respectfully Urged That It Should Summarily Reverse The Ninth Circuit's Decision Because It Directly Conflicts With *Nelson*.

The opposition argues that this case is "entirely different" from *Nelson*. [Brief in Opposition, p. 13.] To the contrary, two more similar cases would be hard to find. Both involve suits by American citizens against foreign sovereigns for personal injury torts occurring abroad and in which recruitment occurred in the United States.[3]

The *Nelson* Court held that a failure to warn of potential dangers during the recruiting process could not form the basis for jurisdiction against a foreign sovereign. *Nelson*, 507 U.S. at 363. The Ninth Circuit, on the other hand, found that Taiwan is subject to suit here because it failed to warn of potential dangers during the recruiting process. In other words, the Ninth Circuit distinguished a failure to "disclos[e] known information concerning prospective dangers" (*Sun*, 201 F.3d at 1110) from "failing to warn . . . of otherwise undisclosed dangers." *Nelson*, 507 U.S. at 354.[4] That is precisely the type of "semantic ploy"

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[3] Respondents' effort to distinguish *Nelson* is wholly specious. At p. 13 of the Brief in Opposition, Respondents assert that there was "no evidence that [the] potential hazard in *Nelson* was ever mentioned or considered in the United States." The failure to warn allegation in *Nelson*, however, is summarized by this Court to have taken place "at the time petitioners recruited Scott Nelson and thereafter," i.e., in the United States. *Nelson*, 507 U.S. at 363.

[4] In footnote 2 of its Opinion, the Ninth Circuit tries to differentiate Plaintiffs' claim from a negligent failure to warn

against which Justice Souter warned in *Nelson*. *Nelson*, 507 U.S. at 363. Such "feint[s] of language" should not be tolerated, particularly when they operate to expand jurisdiction over foreign sovereigns. Accordingly, Taiwan respectfully urges this Court to summarily reverse the Ninth Circuit's ruling below.

CONCLUSION

This case presents a straightforward vehicle for review of an internationally important question: When will foreign governments be required to defend themselves in our courts?

Under principles of comity, the United States government can expect to be treated as we treat other foreign sovereigns. If we throw open the courthouse doors and allow suits to be based on mere minimum contacts, the United States can expect similar treatment abroad. That

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claim, by pointing to the duty of tour organizers "which arises from the arrangement and promotion of the trip." *Sun*, 201 F.3d at 1110, n.2. Yet, by the Ninth Circuit's own ruling, the relevant arrangement of the tour took place in Taiwan. Earlier in the Opinion, at 201 F.3d 1105, 1110, the Ninth Circuit upholds the District Court's finding that the selection of the beach in question occurred in Taiwan. Indeed, the facts are uncontradicted that the Tour was wholly arranged in Taiwan. Given that the Tour was arranged in Taiwan, the only action that Taiwan could take in the United States would be to *warn* decedent of the dangers of the beach. Plaintiffs' case is therefore a failure to warn case barred by *Nelson*. The Supreme Court should summarily reverse to protect the sovereign government of Taiwan from being subjected to a suit clearly barred by this Court's own authority.

exposure to suit may come in other lands where the court system may not be so friendly and may not be predicated upon our notions of due process. Thus, there is risk to the United States in allowing inconsistent and broad-ranging interpretations of the FSIA from circuit to circuit. These issues are not only of national significance, but of international importance as well. For these reasons, Taiwan most respectfully urges this Court to accept review.

Respectfully submitted,

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TEI YAN SUN and YET HWA SUN, individually and as personal representatives of PETER SUN, deceased, and PHILIPE SUN,

Plaintiffs,

v.

TAIWAN, TAIPEI ECONOMIC AND CULTURAL REPRESENTATIVE OFFICE IN THE U.S., CHINA YOUTH CORPS, and OVERSEAS CHINESE AFFAIRS COMMISSION,

Defendants.

_____/

No. C-94-2769 SI

JUDGMENT

(Filed Oct. 15, 1998)

Based on this Court's Order Granting Defendants' Motion to Dismiss for Lack of Jurisdiction, dated October 15, 1998, judgment in this matter is entered in favor of defendants and against plaintiffs.

IT IS SO ADJUDGED.

Dated: October 15, 1998

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge